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IN THE UNITED STATES DISTRICT COURT

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FOR THE NORTHERN DISTRICT OF TEXAS

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DALLAS DIVISION

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UNITED STATES OF AMERICA (NUMBER 3: 04-240-G

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HOLY LAND FOUNDATION, ET AL. (October 9, 2007

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18:00

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CHAMBERS CONFERENCE RE JURY NOTE
BEFORE THE HONORABLE A. JOE FISH

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A P P E A R A N C E S:

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UNITED STATES DEPARTMENT OF JUSTICE

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NORTHERN DISTRICT OF TEXAS

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U.S. Courthouse

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Dallas, Texas 75242

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214/659-8600

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18:00 1

P R O C E E D I N G S:

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THE COURT: As you have been informed, we received a note from the foreperson of jury a short while ago which I don't have in front of me, but it asked in essence, what do we do when a juror refuses to vote. And so I asked that note to be distributed to counsel, and I seek your advice as to what we should do next.

MR. WESTFALL: Your Honor, it may be time to issue the Allen charge that's in the Pattern Fifth Circuit Instructions. I think we have at this -- This is our ninth day, and I think the language in that Allen charge is very helpful at redirecting what they should do. This is a little bit different than the last note. It's totally unspecific. And we think that's probably the logical next step.

MR. JACKS: Judge, I don't think we're at that stage yet. I think this sounds like it fits the definition of not deliberating, but I'm not sure what the law is, to be honest with you. I'm not up to speed on it in terms of what kind of a record the Court has to have --

MS. HOLLANDER: I'm so sorry to interrupt. I'm questioning why Agent Burns is here. This is just attorneys.

THE COURT: I don't know. Would you excuse us, Agent Burns?

18:00 1 MS. BURNS: Absolutely.

2 THE COURT: Go ahead, Mr. Jacks.

3 MR. JACKS: As I said, I'm not up to speed on
4 what the law requires in terms of what the record shows
5 when a jury refuses to deliberate and whether -- I know
6 there has been some discussion about going forward with
7 eleven or bringing in an alternate. But I just think it's
8 a little bit unclear right now about what this -- This
9 note is pretty terse. So we don't know exactly what the
10 situation is.

11 MR. JONAS: Mr. Westfall said we're in the ninth
12 day; we're in the fifth day.

13 THE COURT: I was going to say we had to start
14 over. So that's probably overcounting.

18:00 15 MR. WESTFALL: My body tells me it's nine.

16 MS. MORENO: For eleven of the jurors, we're in
17 the ninth day.

18 MR. JONAS: Well, it's important for the Allen
19 charge. That's why I raised it.

20 THE COURT: Well, we're near the noon recess. I
21 don't think I want to do anything precipitously. Now that
22 I have your views, I think I want to think about it and do
23 some research over the noon hour, and if you think of any
24 information or research I should consider, please give it
25 to me by one o'clock which is when with they go back to

18:00 1 their deliberations.

2 MS. MORENO: Your Honor, I'm not sure what
3 relief the government is requesting.

4 MR. JACKS: Time to look at the law.

5 MS. HOLLANDER: So you don't want to do anything
6 at this point?

7 MR. JACKS: And then when we find out what the
8 law is, probably have the Court either question this juror
9 and see what the problem is or that's, right now, all I
10 can think of.

11 MR. WESTFALL: We'll both do research.

12 MS. HOLLANDER: Your Honor, would it be possible
13 for us to all research and come back together?

14 THE COURT: Sure. We may all have different
18:00 15 ideas.

16 THE COURT: What time do you think we should aim
17 to reconvene?

18 MS. HOLLANDER: 12:45.

19 THE COURT: 12:45 would be ideal in my mind
20 because that would give us time to talk about it and reach
21 a decision by one o'clock, but I recognize that's not too
22 far from now. So there is not a lot of time to research
23 or reflect on it in the meantime.

24 MR. WESTFALL: We'll see what we can do.

25 (Recess)

18:00 1 THE COURT: Is everybody here who's going to be
2 here?

3 MR. WESTFALL: I think we are.

4 MS. HOLLANDER: I think we do.

5 THE COURT: Since we were last together, Ms.
6 Piwoni gave me an e-mail that she received from Mr. Jacks
7 enclosing some cases that the government had found on the
8 issue of releasing a juror and/or going forward with
9 eleven jurors, and she just handed me one from Ms. Cadeddu
10 that also has cases. I have seen these just a few minutes
11 ago, and so I have not had a chance to review the cases
12 themselves. In Mr. Jacks's letter, he says he believes
13 the appropriate course of action is for the Court to
14 interview the foreperson and the juror in question
18:00 15 separately to determine more about the nature of the
16 problem.

17 Anyone else have any thoughts about that?

18 MR. WESTFALL: Your Honor, I don't think that
19 we're at that point. The Edwards case -- which is one
20 that we cited -- out of the Fifth Circuit, it speaks to
21 that issue and incorporates some other cases from outside
22 the circuit but definitely approves their language, and
23 the mine field that we start to get into is intrusion into
24 the deliberative process, and I think this note leaves the
25 doorway open for that. It's completely different than the

18:00 1 Sylvester Holmes note. Can I read you just a little bit
2 of language?

3 THE COURT: Yes.

4 MR. WESTFALL: We're on 733 of the case. In
5 Edwards, we had a juror who did quite a bit of juror
6 misconduct and ultimately was removed for those reasons,
7 and the judge made a particular finding and investigation
8 as to the fact that this person, Juror Number 68, was not
9 being released because of his or her views of evidence but
10 because of the misconduct, including lying to the Court.
11 And what the Fifth Circuit did there was to distinguish
12 that set of facts from the set of facts which I think we
13 have which is a juror -- this vague note about the juror
14 refusing to vote. And I don't know why the juror is
18:00 15 refusing to vote. And what the case says is the case is
16 subject to the reasonable probability rule. "In general,
17 questions of juror bias or competence focus on some event
18 that's both easily identifiable and subject to
19 investigation and findings without intrusion into the
20 deliberative process." I think that is exactly the
21 situation we have with Sylvester Holmes. I think we have
22 the opposite situation here where we are subject to the
23 reasonable probability rule. And what that says is if
24 there is any reasonable probability that this juror's
25 attitude is based upon the sufficiency of evidence, one

18:00 1 way or the other, then that juror cannot be dismissed or
2 released. And quite frankly, getting into that is a mine
3 field that should be approached with a tremendous amount
4 of trepidation. I think that's kind of the situation that
5 we're in right now, that we're poised to get into that
6 deliberative process and that the government's cases don't
7 really address that. A couple of them are cases where the
8 juror became impaired because of mental illness or some
9 sort of a handicap during deliberations. But we have a
10 situation here where we are poised to truly enter into the
11 deliberative process. I think the safe route would be to
12 go ahead and issue an Allen charge and tell them to
13 continue their deliberations, give them some guidance on
14 how to look at the evidence, and if we get some specific
18:00 15 note thereafter that says juror so and so is just not
16 going to decide this case or something more specific than
17 what happens if a juror refuses to vote, there is only one
18 way that that could be a reason to remove, and there is
19 almost innumerable that that could not be a reason to
20 remove -- not ready to vote because they haven't discussed
21 it enough, not ready to vote because they don't like the
22 way the other jurors are treating them. All of those
23 reasons would have to do with the sufficiency of the
24 evidence and not some improper reason that amounts to
25 refusing to follow the Court's instructions. You know, it

18:00 1 has been five days, but you know for eleven of those
2 people it's been nine days, and I just think that an Allen
3 charge from the Court would be the safest and probably the
4 most expeditious route.

5 MR. JACKS: Judge, I don't think an Allen charge
6 is appropriate at this time because in my experience an
7 Allen charge is given when the jury has said we're
8 deadlocked and we can't break that log jam, and then an
9 Allen charge is given. They are not saying that, and they
10 haven't, much to the frustration of a lot of people. They
11 have been back there quietly deliberating for several
12 days. This is the first peep we have heard out of them
13 for five days. I don't know. I understand what Mr.
14 Westfall is talking about in terms of the Court having to
18:00 15 be cautious about asking a question that gets over into
16 the deliberative process, but we also I think have an
17 obligation to try to answer their question if we can, and
18 I think an Allen charge is not the answer. It's not --
19 They are not coming back and saying we are deadlocked and
20 we cannot go any further.

21 So that being said, we've got this question
22 that's been posed to us, and we don't know enough -- The
23 Court doesn't know enough to really answer the question,
24 and I think it's appropriate to make some kind of limited
25 inquiry to find out what is the situation that is meant to

18:00 1 be reflected in this note. And you know, I agree that the
2 Court should probably -- when they talk to either the
3 foreperson -- And our suggestion is to talk to the
4 foreperson since she's the one that wrote this note.
5 Caution her. Look, I don't want to talk about where you
6 are or anything like that. I'm trying just to answer your
7 question. And perhaps just have some prepared questions
8 to ask her and then go from there. I was sitting here a
9 few minutes ago thinking about what kind of questions
10 could you ask that would not be intruding into the
11 deliberative process, and just you know, has this person
12 voted in the past or I think there are questions the Court
13 can ask which will shed some light on this situation, and
14 as I said, I don't think an Allen charge is called for,
18:00 15 but I don't think to ignore this and tell them to keep
16 going is serving any purpose either.

17 MR. WESTFALL: Your Honor, on that last thing
18 Mr. Jacks said, that probably is an option to submit an
19 instruction to the jury saying continue your deliberations
20 and refer them to the last part of the charge that refers
21 to listening to each other and deliberating.

22 THE COURT: I don't have the note in front of
23 me. Again, could I borrow your copy to refresh my
24 recollection of what it said?

25 MS. SHAPIRO: Your Honor, the Fifth Circuit

18:00 1 cites a case called United States versus Baker which is a
2 Second Circuit, but it's cited by the Fifth Circuit in
3 United States versus Naji, and the Baker cite is 262 F 3rd
4 124, Second Circuit 2000, and in this case they talk about
5 the issue of the line that the Court needs to be aware of
6 in terms of probing the jury, but it concludes that it's
7 appropriate to make the inquiry when there is a juror who
8 may be refusing to deliberate, and it talks about that
9 circumstance. So I think the cases in the Fifth Circuit
10 certainly seem to say it's important to have a record to
11 make the determination of whether it's truly a refusal to
12 deliberate or participate in the process versus something
13 that's connected to the evidence.

14 MR. WESTFALL: Out of curiosity, is that a
18:00 15 published case?

16 MS. SHAPIRO: The Baker case is published. Naji
17 is not.

18 MR. WESTFALL: The Fifth Circuit case is not.

19 MS. HOLLANDER: I'm not sure that I disagree
20 with Ms. Shapiro if we get to that point. In one of these
21 cases -- and I read them pretty fast. And I think it was
22 the Thomas case where it went through the litany the judge
23 had asked. I could be wrong because I read this fast, but
24 I think it was reversed because the judge got into the
25 discussion, and the juror said, Well, I don't like that

18:00 1 law, and if I'd known that was what it was, I would never
2 have agreed to serve. That clearly got into the jury
3 process and the sufficiency of evidence. And it's the one
4 thing, as Mr. Westfall said, to avoid at all costs.

5 MS. SHAPIRO: And Baker discusses that case as
6 falling on the other side of the line.

7 MS. HOLLANDER: That's where we don't want to
8 be. You would be asking the question, so where you don't
9 want to be. And it's very hard to ask the questions and
10 have absolutely no doubt, and I believe Edwards said there
11 can be no doubt that the issue -- before the Court removes
12 a juror that the issue doesn't have to do with that
13 juror's weighing of the evidence. But it seems to me --
14 And I agree with Mr. Westfall, there is no -- nothing to
18:00 15 be lost by telling them what the modified Allen charge --
16 1.45 which is the Fifth Circuit's pattern Allen
17 charge says, which tells them you have to try to reach a
18 verdict, and if you give them that Allen charge and they
19 come back, you know, and say we still got a juror who
20 refuses to vote, then I think it's time to go to the next
21 step.

22 MR. GARRETT: As Mr. Jacks says, I do think that
23 accepts that votes are being cast. Here someone is saying
24 I'm not going to participate in the process. The question
25 becomes whether that juror is incapacitated -- physically

18:00 1 mentally, emotionally -- or saying I'm not going to vote,
2 which is all the same result. If the Court would in its
3 remarks to the juror in the beginning preface it by saying
4 these are things I do not want to discuss or want you to
5 remark on, but going back to can you consider the
6 evidence, cast a vote and render a decision in this case,
7 can you serve the fundamental requirements of a juror.
8 And yes or no. And if the answer is, no, I can't, then I
9 think we're at the point we can reach a decision on the
10 incapacitation.

11 MS. HOLLANDER: It's not necessarily
12 incapacitation, though.

13 MR. WESTFALL: We're all sitting around the
14 table speculating about what the juror means by this note
18:00 15 and what can we do. And Edwards says a trial judge may
16 not be able to assess the competence without exposing the
17 juror's views. So it's the penetration into the secrecy
18 of the deliberations that is going to suffer by us
19 satisfying our curiosity.

20 THE COURT: What if the note means what it says,
21 that this person is sitting in the corner and refusing to
22 participate?

23 MR. DRATEL: We don't know why.

24 MS. MORENO: And he may want more deliberation.

25 This is the school teacher. I'm sure she is

18:00 1 choosing her words carefully. Perhaps he or she wants
2 more deliberation, and if you Allen charge them, that
3 would remedy that issue and concern and would avoid the
4 pitfalls the court is facing if you go into any --

5 MR. GARRETT: Are you suggesting it's a pitfall
6 if the juror says I want more time to deliberate?

7 MR. DRATEL: We don't know that's the answer. I
8 would articulate it this way. All the cases, the cases
9 cited by the government -- Regardless of which side of the
10 line they fall on, all of the cases stand for the
11 proposition that an inquiry into the deliberative process
12 is a last resort. We haven't gotten to the first resort.
13 It would be turning the whole legal framework as presented
14 in these cases upside down to use the last resort first.

18:00 15 THE COURT: I have never heard the Allen charge
16 referred to as a first resort.

17 MR. DRATEL: If you are trying to avoid the
18 deliberative process and intruding on it, it is certainly
19 a prior resort to bringing in a juror and getting into
20 those questions. You know, I don't see how you fashion a
21 set of questions that doesn't get into it.

22 MS. SHAPIRO: What all the cases agree on is
23 there needs to be a factual record. In each case the
24 judge went back --

25 MR. DRATEL: Not necessarily. Some of the cases

18:00 1 the judge did other things first. The judge re-instructed
2 the juror. The judge did other things in some of the
3 cases.

4 THE COURT: I wanted to refresh my memory what
5 the modified Allen charge says because it's been a while
6 since I have given it.

7 I'll have to say this issue is really
8 unprecedented in my experience, and I have not really
9 found clear guidance in the case law which I did look at
10 some myself before I received your e-mails, and I have not
11 had a chance, as I said earlier, to go through the cases
12 that the parties have cited. But it does seem to me it's
13 going to be difficult if I interview the foreperson and/or
14 the juror who's the subject of this note to fashion
18:00 15 questions that do not even inadvertently intrude into the
16 deliberative process of the jury. So it does seem to me
17 that probably the conservative thing to do is to give this
18 modified Allen charge. So I think that's what I will do
19 as soon as we can bring the jury back into the courtroom.
20 This is probably something that I think the defendants
21 themselves would need to be present for. So we need to
22 assemble them, if they are not there.

23 I also needed to let counsel know -- I was
24 thinking of getting you all together even before the note
25 came today. Since we don't know how long the jury will be

18:00 1 deliberating, I need to tell you something about my
2 schedule because I am going to be out of pocket myself
3 some in the near future, and this week it's fairly
4 minimal. Tomorrow afternoon at three I have a meeting
5 that will probably last an hour or two. So if we get a
6 note there may be some delay in my responding to it.
7 Friday I'm supposed to preside over an annual award
8 ceremony for our court employees in Dallas. I'll probably
9 be out of pocket thirty minutes to an hour for that. If
10 the jury is still going on Friday of next week, there is a
11 similar award ceremony in Fort Worth. So I will probably
12 be gone all afternoon for that, and then the following
13 week I'm out of town every day but Friday. So if the jury
14 is still going by then, I need you to be thinking about
18:00 15 whether we recess the jury, whether I try to handle the
16 questions by telephone or bring in a magistrate judge or
17 one of the other district judges or what you would like me
18 to do.

19 MS. HOLLANDER: And my understanding Monday is a
20 holiday.

21 THE COURT: Yes.

22 MR. WESTFALL: That would be opposed to thinking
23 about flinging myself off a bridge.

24

25

C E R T I F I C A T I O N

I, Cassidi L. Casey, certify that during the proceedings of the foregoing-styled and -numbered cause, I was the official reporter and took in stenotypy such proceedings and have transcribed the same as shown by the above and foregoing Pages 1 through 17 and that said transcript is true and correct.

I further certify that the transcript fees and format comply with those prescribed by the court and the Judicial Conference of the United States.

s/Cassidi L. Casey

CASSIDI L. CASEY
UNITED STATES DISTRICT REPORTER
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION
CSR NUMBER 1703

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